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In the Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA, ET AL.,
PETITIONERS

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its instrumentalities are immune from suit in United States courts, subject to limited statutory exceptions. The expropriation exception provides that a foreign state is not immune "in any case * * * in which rights in property taken in violation of international law are in issue" and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3).

The question presented is whether a district court lacks jurisdiction under Section 1330(a) and Section 1605(a)(3) on the ground that a plaintiff in an action against a foreign state has failed to make legally sufficient allegations of "rights in property" or a "tak[ing] in violation of international law" only when the plaintiff's claim that "rights in property taken in violation of international law are in issue" is frivolous or completely devoid of merit.

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INTEREST OF THE UNITED STATES

This case concerns the appropriate standard for establishing jurisdiction in an action against a foreign state under the Foreign Sovereign Immunities Act of 1976 (FSIA or Act), 28 U.S.C. 1330, 1441(d), 1602 *et seq.* Because application of the FSIA's jurisdictional provisions has implications for the treatment of the United States in foreign courts and for its relations with other sovereigns, the United States has a substantial interest in this case. At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

1. The FSIA establishes "a comprehensive set of legal standards governing claims of immunity in every

civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983). The FSIA provides that a foreign state and its agencies and instrumentalities "shall be immune from the jurisdiction" of federal and state courts except as provided by certain international agreements and by exceptions enumerated in the statute. 28 U.S.C. 1604; see 28 U.S.C. 1605-1607. It also provides that federal district courts shall have jurisdiction "of any nonjury civil action * * * as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement." 28 U.S.C. 1330(a).

The exception to immunity involved in this case, which is set forth in Section 1605(a)(3), is known as the expropriation exception. It provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights in property taken in violation of international law are in issue" and there is a specified commercial-activity nexus to the United States. 28 U.S.C. 1605(a)(3). The nexus requirement is that the property taken or "any property exchanged for such property" must be (1) "present in the United States in connection with a commercial activity carried on in the United States by the foreign state," or (2) "owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." *Ibid.*

2. a. In the mid-1970s, petitioner Bolivarian Republic of Venezuela (Venezuela) nationalized its oil in-

dustry. Pet. App. 4a. As a result, Venezuela controls production and exportation of oil through two state-owned corporations, petitioners Petróleos de Venezuela, S.A., and PDVSA Petróleo (collectively PDVSA). *Ibid.*

For many decades, respondent Helmerich & Payne International Drilling Company (H&P-IDC), a United States company, provided oil-drilling services to petitioners through a wholly owned subsidiary, most recently respondent Helmerich & Payne de Venezuela, C.A. (H&P-V). H&P-V is incorporated under Venezuelan law. Pet. App. 3a-4a, 39a.

In 2007, H&P-V entered into contracts with PDVSA to provide drilling services for a fixed period using highly specialized drilling rigs, which H&P-IDC purchased and then transferred to H&P-V. Pet. App. 4a. By 2009, petitioners had failed to pay approximately $100 million owed to H&P-V for its drilling services. H&P-V responded by fulfilling its existing contractual obligations, announcing that it would not renew the contracts until it was paid, and disassembling its drilling rigs. *Id.* at 4a-5a.

In June 2010, petitioners blockaded H&P-V's properties where the disassembled rigs were located. Pet. App. 5a; see *id.* at 5a-6a. Shortly thereafter, the Venezuelan National Assembly enacted a measure recommending that then-President Hugo Chavez expropriate H&P-V's property, and he issued an expropriation decree the same day. *Id.* at 6a, 44a. Petitioners "now use[] H&P-V's rigs and other assets in [their] state-owned drilling business." *Id.* at 8a.

b. Respondents filed suit in the District Court for the District of Columbia, claiming that (1) PDVSA and Venezuela took respondents' property in violation of

international law, and (2) PDVSA breached the drilling contracts with H&P-V. Pet. App. 45a-46a; see J.A. 103-104; see also J.A. 84 (alleging that respondents were "subjected to discriminatory treatment" because of their association with the United States). As to the first count, respondents asserted that the court had jurisdiction over the claim under 28 U.S.C. 1605(a)(3).[1] Pet. App. 8a.

As relevant here, petitioners moved to dismiss respondents' expropriation claims on the ground that they did not fall within the scope of the exception to immunity in Section 1605(a)(3). Pet. App. 8a. The parties agreed to brief certain threshold issues, including whether "H&P-V is a national of Venezuela under international law" and whether "H&P-IDC has standing to assert a taking in violation of international law" based on Venezuela's expropriation of H&P-V's property. *Id.* at 9a; see J.A. 119 (order stating that resolution of those issues would "assum[e] the truth" of the complaint's factual allegations).

The district court granted the motion to dismiss in part and denied it in part. The court dismissed H&P-V's expropriation claim because it determined that H&P-V is a national of Venezuela. Pet. App. 49a-59a, 91a; see *id.* at 12a ("[G]enerally, a foreign sovereign's expropriation of its own national's property does not violate international law."); *id.* at 93a-94a. But the court declined to dismiss H&P-IDC's expropriation

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[1] Respondents' contract claims are the subject of a certiorari petition pending before this Court (No. 15-698) involving the separate commercial-activity exception to immunity in 28 U.S.C. 1605(a)(2). The United States filed an amicus brief in that matter, at this Court's invitation, expressing the view that the Court should deny the petition.

claim, reasoning that although H&P-IDC did not own the property petitioners allegedly seized from H&P-V, H&P-IDC asserted that petitioners effectively took its interest in H&P-V as a going concern. *Id.* at 81a-90a.

3. The court of appeals affirmed the district court's expropriation-related rulings in part and reversed in part. Pet. App. 1a-29a.

a. The court of appeals first addressed the standard for determining whether respondents' "takings claim[s]" fell within the scope of the expropriation exception. Pet. App. 10a-12a. The court rejected the contention that the claims should be dismissed because they did not, as a legal matter, sufficiently allege "rights in property taken in violation of international law" under Section 1605(a)(3). 28 U.S.C. 1605(a)(3); Pet. App. 11a. Relying on *Bell* v. *Hood*, 327 U.S. 678 (1946), and D.C. Circuit precedent relying on *Bell*, the court stated that subject-matter jurisdiction "is not defeated" by the possibility that a complaint "might fail to state a cause of action on which petitioners could actually recover." Pet. App. 11a (citation omitted); see *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940-941 (D.C. Cir. 2008). The court concluded instead that it "will grant a motion to dismiss" for lack of jurisdiction under the FSIA "on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . . . in issue' *only* if the claims are 'wholly insubstantial or frivolous'"—a standard that the court described as setting an "exceptionally low bar." Pet. App. 11a (quoting *Chabad*, 528 F.3d at 943, 946).

The court of appeals next held that H&P-V had "asserted a non-frivolous international expropriation claim."

Pet. App. 12a; see *id.* at 13a-17a. The court acknowledged that, under the so-called domestic-takings rule, a foreign state's expropriation of its own national's property does not violate international law. *Id.* at 12a. But the court understood a pre-FSIA Second Circuit decision, *Banco Nacional de Cuba* v. *Sabbatino*, 307 F.2d 845, 861 (1962), rev'd on other grounds by 376 U.S. 398 (1964), to hold that international law prohibits a state from expropriating the property of a domestic corporation based on discrimination against the corporation's foreign shareholders. Pet. App. 13a-14a. In light of *Sabbatino*, and in the absence of "any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to *inescapably* render the claim[] frivolous and *completely* devoid of merit," the court held that H&P-V's claim "has satisfied this Circuit's forgiving standard." *Id.* at 16a (citation and internal quotation marks omitted).

The court of appeals likewise held that H&P-IDC's claim that its own "rights in property" had been taken in violation of international law was not frivolous. Pet. App. 17a-22a. The court noted that "shareholders may have rights in corporate property" that are not derivative of the corporation's rights, *id.* at 20a, and that H&P-IDC alleged that it had suffered "a total loss of control over its subsidiary," *id.* at 22a. Accordingly, without resolving the legal question of whether H&P-IDC had viably alleged "rights in property" under Section 1605(a)(3), the court ruled that "H&P-IDC has 'put its rights in property in issue in a non-frivolous way.'" *Ibid.* (quoting *Chabad*, 528 F.3d at 941).

b. Judge Sentelle dissented in part. Pet. App. 30a-36a. He would have held that both H&P-V and H&P-

IDC had "failed to plead a taking in *violation of international law*." *Id.* at 34a (citation omitted); see *id.* at 32a-33a ("To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA.").

SUMMARY OF ARGUMENT

Section 1605(a)(3) of the Foreign Sovereign Immunities Act creates a narrow exception to foreign sovereign immunity in certain cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). Like the FSIA's other exceptions to immunity, the expropriation exception "codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). And "whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies." *Id.* at 497-498. The court of appeals erred in holding that merely non-frivolous allegations regarding the substantive requirements of an immunity exception were sufficient to establish jurisdiction—a standard that the court itself described as "exceptionally low." Pet. App. 11a.

For a case to come within the scope of Section 1605(a)(3), the complaint must assert a claim that is legally sufficient to satisfy the provision's substantive requirements. When the foreign state challenges the legal sufficiency of the complaint's jurisdictional allegations under Federal Rule of Civil Procedure 12(b)(1), the district court must determine whether the plaintiff's allegations, if true, actually describe a "tak[ing]

in violation of international law"—that is, conduct that is prohibited by international expropriation law—and identify "rights in property" that were impaired as a result of the foreign state's conduct. If those substantive requirements are not satisfied, the foreign state is immune from suit both federal and state courts, the district court lacks subject-matter jurisdiction, and the claim must be dismissed.

That conclusion is dictated by the FSIA's text and purposes, as well as by this Court's precedent. The FSIA calls for courts to decide a foreign state's "entitle[ment]" to immunity, not to hypothesize about what the outcome of that analysis could conceivably be. 28 U.S.C. 1330(a); see 28 U.S.C. 1602. Section 1605(a)(3) requires that "rights in property taken in violation of international law are in issue"—not that such rights may be in issue, or that there may have been a taking that international law might proscribe. 28 U.S.C. 1605(a)(3). And requiring a legal determination of immunity at the "threshold" of the action, *Verlinden*, 461 U.S. at 493-494, is necessary to ensure that the foreign state actually receives the protections of immunity if no exception applies, to preserve the dignity of the foreign state and comity between nations, and to safeguard the interests of the United States when it is sued in foreign courts. This Court has made just such an analysis of legal sufficiency when considering the application of other FSIA exceptions, including the exception for cases "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4); see *Permanent Mission of India to the U.N.* v. *City of N.Y.*, 551 U.S. 193, 198-199 (2007).

In holding otherwise, the court of appeals relied only on this Court's decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), which construed the "aris[ing] under" requirement in the federal-question jurisdictional statute. But the *Bell* standard, which is derived from a statute that does "nothing more than grant jurisdiction over a particular class of cases," *Verlinden*, 461 U.S. at 496-497, has no application in the FSIA context, where Congress—impelled by foreign relations concerns that are specific to suits against foreign sovereigns—made foreign states presumptively immune and imposed substantive preconditions to the existence of jurisdiction that must be satisfied in every case.

The court of appeals failed to assess whether respondents' allegations were legally sufficient to establish that petitioners' alleged actions violated international law or that H&P-IDC's own rights in property were in issue. Accordingly, the judgment should be vacated and the case remanded for further consideration under the proper standard.

ARGUMENT

A. A Foreign State Is Immune From State Or Federal Court Jurisdiction In A Suit Brought Pursuant To The Expropriation Exception Unless The Plaintiff's Allegations Are Legally Sufficient To Satisfy The Exception's Substantive Requirements

1. The United States has long recognized that foreign sovereigns are generally immune from suit in our courts. See *Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812) (explaining that sovereign immunity rests on the "perfect equality and absolute independence of sovereigns, and th[e] common interest impelling them to mutual intercourse"); see also

Samantar v. *Yousuf*, 560 U.S. 305, 311 (2010). For much of the Nation's history, the United States adhered to the "absolute" theory of foreign sovereign immunity, under which foreign states were not subject to suit without their consent. See, *e.g.*, *Verlinden*, 461 U.S. at 486-487; *Permanent Mission*, 551 U.S. at 199.

The courts historically looked to "the political branch of the government charged with the conduct of foreign affairs" to decide whether absolute immunity should be recognized in a particular case. *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34 (1945); see *Verlinden*, 461 U.S. at 486; *Ex parte Republic of Peru*, 318 U.S. 578, 588-589 (1943). In 1952, the Department of State adopted the "restrictive" theory of foreign sovereign immunity, under which a foreign state generally was immune from suit for sovereign or public acts but not for commercial acts. See *Verlinden*, 461 U.S. at 486-487.

In 1976, Congress enacted the FSIA, which establishes comprehensive "legal standards" governing claims of immunity in all civil actions against foreign states. *Verlinden*, 461 U.S. at 488. "For the most part, the Act codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Ibid.*; see H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (*House Report*). The Act also "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004); see 28 U.S.C. 1602.

The FSIA sets forth a general rule that a foreign state "shall be immune" from suit in federal and state courts unless the suit comes within one of the FSIA's specific exceptions to that rule (or an exception is

provided by an applicable international agreement). 28 U.S.C. 1604; see 28 U.S.C. 1605-1607; *Altmann*, 541 U.S. at 691; see also *House Report* 17 (FSIA "starts from a premise of immunity"). The exception invoked in this case provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which rights in property taken in violation of international law are in issue" and a specified commercial-activity nexus with the United States is present. 28 U.S.C. 1605(a)(3).

The FSIA also provides that when the requirements of one (or more) of the immunity exceptions are met, and a foreign state is therefore not immune from suit, 28 U.S.C. 1604, federal district courts shall have subject-matter jurisdiction over the relevant claims. 28 U.S.C. 1330(a) (conferring jurisdiction "of any nonjury civil action * * * as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement"). Accordingly, "subject-matter jurisdiction" in any action against a foreign state "depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden*, 461 U.S. at 493; see *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 355 (1993) (same); *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (same); see also 28 U.S.C. 1330(b)-(c) (when district court has subject-matter jurisdiction and service is proper, then "[p]ersonal jurisdiction over a foreign state shall exist").

2. As this Court held in *Verlinden*, the FSIA sets forth "substantive" standards of federal law governing

the sovereign immunity of a foreign state, and Section 1330(a)'s grant of subject-matter jurisdiction therefore also incorporates those substantive requirements. 461 U.S. at 493, 497; see *Altmann*, 541 U.S. at 694-696; see also *Hoffman*, 324 U.S. at 36 (sovereign immunity is "accepted rule of substantive law"); *Ex parte Peru*, 318 U.S. at 588 (sovereign immunity is "overriding principle of substantive law"); *Oliver Am. Trading Co.* v. *Mexico*, 264 U.S. 440, 442-443 (1924).

In *Verlinden*, the Court considered "whether Congress exceeded the scope of Art. III of the Constitution by granting federal courts subject-matter jurisdiction over certain civil actions * * * against foreign sovereigns" that fall outside the bounds of diversity jurisdiction. 461 U.S. at 491. Interpreting the FSIA in light of its text, context, and purposes, the Court held that "a suit against a foreign state under th[e] [FSIA] necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Art. III." *Id.* at 493; see *id.* at 492. That is so, the Court explained, because the FSIA's rule of immunity and its exceptions to that immunity are an exercise of Congress's "undisputed power" under Article I "to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States"—a decision that "raise[s] sensitive issues concerning the foreign relations of the United States" and as to which the "primacy of federal concerns is evident." *Id.* at 493; see *ibid.* (noting Congress's "authority over foreign commerce and foreign relations"). It was to "promote these federal interests" that Congress chose to "enact[] a statute comprehensively regulating the amena-

bility of foreign nations to suit" in federal or state court under "detailed federal law standards." *Id.* at 493-494.

In so ruling, the Court in *Verlinden* rejected several arguments that the FSIA's immunity-related provisions have a limited, non-substantive reach. As an initial matter, the Court explained that Congress's power to enact the relevant provisions was not constrained by the various limitations that have been imposed in interpreting 28 U.S.C. 1331, "which grants district courts general federal-question jurisdiction over any case that 'arises under' the laws of the United States." *Verlinden*, 461 U.S. at 494; see *id.* at 495 ("the Court of Appeals' heavy reliance on decisions construing [Section 1331] was misplaced").

The Court also rejected the contention that the FSIA is merely "a jurisdictional statute" and therefore "can never constitute the federal law under which the action arises, for Art. III purposes." *Verlinden*, 461 U.S. at 496. The Court contrasted statutes that seek "to do nothing more than grant jurisdiction over a particular class of cases" with the FSIA, which "does not merely concern access to the federal courts" but rather is a "comprehensive scheme" substantively regulating "foreign commerce" and foreign relations. *Id.* at 496-497; see *ibid.* (noting that the FSIA "governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, *federal or state*") (emphasis added); *id.* at 495 n.22. The Court concluded that because "[t]he [FSIA] codifies the standards governing foreign sovereign immunity as an aspect of substantive federal law," and "applying those standards will generally require interpretation of numerous points of federal law," the

fact that "the inquiry into foreign sovereign immunity" is "labeled" a matter of subject-matter jurisdiction "does not affect the constitutionality" of the statute. *Id.* at 497.

3. The Court further explained in *Verlinden* that the substantive question of immunity is one that must be resolved at the outset of a case. "At the threshold of every action in a district court against a foreign state, * * * the court must satisfy itself that one of the exceptions applies—and in doing so it must apply the detailed federal law standards set forth in the Act." 461 U.S. at 493-494; see *id.* at 497-498 ("whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies"). It necessarily follows that when a foreign state moves to dismiss a complaint for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on the ground that the claim as pleaded does not meet the substantive requirements of the relevant exception to immunity, the district court must determine whether the allegations are legally sufficient to satisfy those requirements.[2] If not, the court must dismiss the case.

a. The text of the relevant FSIA provisions dictates that conclusion. Assessing whether a claim falls

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[2] When the foreign state challenges the factual basis for jurisdiction, the court must go beyond the pleadings and resolve disputed issues of fact necessary to determine subject-matter jurisdiction. See *Phoenix Consulting, Inc.* v. *Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000); see generally 13D Charles Alan Wright et al., *Federal Practice and Procedure* § 3564, at 93 n.7 (3d ed. Supp. 2016). In this Court, this case involves a legal, not factual, challenge to jurisdiction.

within a particular statutory grant of jurisdiction is, after all, a question of statutory construction, see *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 21-22 (1983), and "the subject-matter jurisdiction of the lower federal courts is determined by Congress 'in the exact degrees and character which to Congress may seem proper for the public good,'" *Amerada Hess*, 488 U.S. at 433-434 (quoting *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845)).

In Section 1330(a), Congress provided that a district court has subject-matter jurisdiction over an action against a foreign state only if "the foreign state is not entitled to immunity either under sections 1605-1607 of [Title 28] or under any applicable international agreement." 28 U.S.C. 1330(a). And in Section 1602, which defines the purposes of the FSIA, Congress provided that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States * * * in conformity with the principles set forth in this chapter." 28 U.S.C. 1602. Those provisions establish that a federal court lacks the power to proceed until it has actually "decided" that the foreign state is not legally "entitled to immunity." 28 U.S.C. 1330(a), 1602. Hypothesizing about what the outcome of such a substantive determination might ultimately be is not sufficient.

In order for a foreign state to lack immunity under the FSIA exception invoked in this case, the suit must be one "in which rights in property taken in violation of international law are in issue." 28 U.S.C 1605(a)(3). The term "in issue" means under discussion or in dispute. See Bryan A. Garner, *A Dictionary of Modern Legal Usage* 470 (2d ed. 1995); see also *United*

States v. *Congress Constr. Co.*, 222 U.S. 199, 200-201 (1911); cf. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Elahi*, 556 U.S. 366, 379-384 (2009) (interpreting statutory term "at issue" similarly). And Section 1605(a)(3) defines what must be in dispute in the case for the exception to apply: actual "rights in property taken in violation of international law." In other words, the allegations in the complaint must be legally sufficient to identify property rights that serve as the basis for the plaintiff's claim, as well as to establish that a "tak[ing] in violation of international law" has indeed taken place, in order for a district court to have the power to resolve a dispute stemming from such an alleged taking.

A court cannot "satisfy itself" that a claim comes within its jurisdiction, *Verlinden*, 461 U.S. at 494, unless it determines the scope of the substantive requirements in Section 1605(a)(3) and decides that the plaintiff's allegations fulfill them. Section 1605(a)(3) thus cannot be read to obviate a foreign state's immunity when "rights in property taken in violation of international law" *may be* "in issue"—when, for example, there is an unresolved dispute about whether a taking of property (as alleged) violated international law or simply the foreign state's own law. A dispute encompassed by Section 1605(a)(3) is one in which the plaintiff's allegations, if true, are sufficient as a matter of law to establish that a taking in violation of international law has occurred and that the plaintiff has rights in the relevant property, and the plaintiff seeks some form of relief on the ground that those rights have not been vindicated. See *House Report* 19-20 ("[t]he term 'taken in violation of international law' would include the nationalization or expropriation

of property without payment of the prompt adequate and effective compensation required by international law," and "takings which are arbitrary or discriminatory in nature").

Congress's decision to limit the exercise of jurisdiction over a foreign sovereign under Section 1605(a)(3) to cases in which "rights in property taken in violation of international law are in issue" no doubt stems from the very nature of the substantive restriction that the exception embodies. Governmental decisions involving property—particularly real property—within a sovereign's own territorial jurisdiction are generally reserved to that sovereign free of interference by the courts of another nation. See, *e.g.*, *Asociacion de Reclamantes* v. *United Mexican States*, 735 F.2d 1517, 1520-1524 (D.C. Cir. 1984) (Scalia, J.), cert. denied, 470 U.S. 1051 (1985). In enacting Section 1605(a)(3), Congress decided that foreign states would be subject to suit in U.S. courts in only a narrow class of cases—ones in which "international law" has been "violat[ed]" by such an action and a commercial-activity nexus to the United States is present. Without those limitations, the case would raise what would otherwise be purely a question of the domestic law of the nation where the property is located or would lack a sufficient connection to the United States to justify the exercise of jurisdiction over a foreign state. See, *e.g.*, *de Sanchez* v. *Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985). And to ascertain whether such a dispute is before the court, the legal adequacy of the plaintiff's allegations must be assessed before the case moves forward.

Evaluating a complaint's legal adequacy in that way is precisely the approach that this Court has

already taken with respect to a closely analogous subsection of Section 1605: Section 1605(a)(4), which creates an exception to immunity for suits "in which * * * rights in immovable property situated in the United States are in issue." 28 U.S.C. 1605(a)(4). In *Permanent Mission*, *supra*, the Court determined whether, as a matter of law, the plaintiff's claim to enforce a tax lien under New York law fell within Section 1605(a)(4). The Court first determined the scope of Section 1605(a)(4)'s reference to "rights in * * * property," concluding that it extended to non-ownership and non-possessory interests. 551 U.S. at 198-199. The Court then analyzed the content of the lien right asserted under New York law, concluding that the tax lien encumbered the right to convey the relevant property. See *ibid.* The Court accordingly held that the lien-enforcement suit "implicate[d] 'rights in immovable property'" in the United States within the meaning of the FSIA exception. *Id.* at 199. The Court thus determined that the claim pleaded in the complaint was legally sufficient to fulfill Section 1605(a)(4)'s requirements.[3]

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[3] The Court has given similar treatment to other immunity exceptions. See *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 395-398 (2015) (conclusively resolving at Rule 12(b)(1) stage whether action for personal injury was "based upon a commercial activity" under Section 1605(a)(2)); *Nelson*, 507 U.S. at 351 (same); *Amerada Hess*, 488 U.S. at 439-443 (conclusively deciding at Rule 12(b)(1) stage that "none" of the FSIA's immunity exceptions "apply to the facts of this case"). Outside the sovereign-immunity context, certain other jurisdictional provisions have been held to call for a definitive legal assessment of substantive requirements at the threshold of the case. See, *e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 278-279 (1977) (explaining that 28 U.S.C. 1343, which grants federal courts jurisdiction over

b. Ensuring that an action does not proceed past the "threshold," *Verlinden*, 461 U.S. at 493-494, unless the allegations of the complaint are legally sufficient to satisfy the requirements of an exception to immunity is critical to carrying out the purposes of the FSIA.

First, the FSIA is intended to confer immunity from *suit*, not merely liability. Making a legal determination at the outset of the case about whether immunity is applicable is the only way to ensure that a foreign state can realize that important protection. It is the very nature of immunity to protect[] against "the costs, in time and expense, and other disruptions attendant to litigation." *EM Ltd.* v. *Republic of Argentina*, 473 F.3d 463, 486 (2d Cir.) (citation omitted), cert. denied, 552 U.S. 818 (2007); see *Republic of Philippines* v. *Pimentel*, 553 U.S. 851, 865 (2008) (immunity is designed to "give foreign states and their instrumentalities some protection from the inconvenience of suit") (quoting *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 479 (2003)); *Moran* v. *Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994) ("[S]overeign immunity under the FSIA is immunity from suit, not just from liability."); cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity protects government officials from "the costs of trial or * * * the burdens of broad-reaching discovery") (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982)). Making jurisdiction a negligible requirement would "frustrate the significance and benefit of entitlement to immunity" by imposing the very burdens and costs that immunity is intended to shield against. *Fore-*

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actions brought to redress deprivation of federal rights under color of state law, requires inquiry into "whether a statutory action had in fact been alleged").

most-McKesson, Inc. v. *Islamic Republic of Iran*, 905 F.2d 438, 449 (D.C. Cir. 1990) (citation omitted); see *ibid.* ("Where, as with foreign sovereigns, immunity involves protection from suit, not merely a defense to liability, more than the usual is required of trial courts in making pretrial * * * legal determinations."); *Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 347 (7th Cir. 1987). For those reasons, appellate courts have consistently concluded that the denial of a Rule 12(b)(1) motion asserting sovereign immunity may be appealed immediately. See *Permanent Mission*, 551 U.S. at 197; *Moran*, 27 F.3d at 172; *Rein* v. *Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 755-756 (2d Cir. 1998), cert. denied, 527 U.S. 1003 (1999); Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations*, at 694-700 (2d ed. 2003) (collecting authorities).

Second, the FSIA's general rule of presumptive immunity, and the limited exceptions thereto, are intended to preserve the dignity of foreign sovereigns and to ensure comity between nations. See, *e.g.*, *Pimentel*, 553 U.S. at 865-866; *National City Bank* v. *Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity derives from concerns that include "respect for the 'power and dignity' of the foreign sovereign"). Subjecting a foreign sovereign to the jurisdiction of a U.S. court without first making the substantive legal determination that the FSIA's immunity exceptions dictate may well be understood as "an affront to [that sovereign's] dignity." *Hoffman*, 324 U.S. at 35-36. It also may well damage relations with that sovereign. See *id.* at 35 ("Every judicial action exercising or relinquishing jurisdiction over * * * a foreign government" may "effect * * * our relations with that

government."); *Ex parte Peru*, 318 U.S. at 588-589; see also generally *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968) (assertions of state authority in matters of international importance have "a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems"). In the "vast external realm, with its important, complicated, delicate and manifold problems," *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936), perceived affronts to foreign states may result over the long term in reduced cooperation in a variety of areas. That is the opposite of what the FSIA was intended to accomplish. See *House Report* 26-27 (expressing intent to "ease the conduct of foreign relations by the United States"); *id.* at 11, 32, 45; see also *Zappia Middle East Constr. Co.* v. *Emirate of Abu Dhabi*, 215 F.3d 247, 250-252 (2d Cir. 2000).

Finally, and relatedly, ensuring that a substantive threshold determination is made about whether a plaintiff's allegations satisfy one of the statute's exceptions to immunity serves the "reciprocal self-interest" of the United States—another one of the FSIA's purposes. *National City Bank*, 348 U.S. at 362; see *House Report* 9; *Garb* v. *Republic of Poland*, 440 F.3d 579, 585 (2d Cir. 2006). The United States engages in extensive activities overseas in support of its worldwide diplomatic, security, and law enforcement missions, and it is not infrequently sued in foreign courts. See generally Dep't of Justice, *Office of Foreign Litigation* (OFL), https://www.justice.gov/civil/office-foreign-litigation ("At any given time, foreign lawyers under OFL's direct supervision represent the United States in approximately 1,000 lawsuits pending

in the courts of over 100 countries."). Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), a full substantive determination about a foreign sovereign's immunity under the FSIA must be made at the outset of the case—lest suits against the United States abroad be permitted to proceed past their initial stages, thus embroiling the United States in expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated. Cf. *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing statute to avoid "invit[ing] retaliatory action from other nations"); *Persinger*, 729 F.2d at 841 (declining to adopt construction of FSIA that bore the "potential for international discord and for foreign government retaliation"); cf. also *Boos* v. *Barry*, 485 U.S. 312, 323 (1988) (highlighting importance of "concept of reciprocity" in international law and diplomacy and explaining that respecting diplomatic immunity of foreign states "ensures that similar protections will be accorded" to the United States). That damaging consequence is one that Congress would have wanted to avoid in enacting the strong immunity protections in the FSIA.

B. The Court Of Appeals Erred In Ruling That Jurisdiction Was Proper So Long As Respondents' Allegations That The Substantive Standards Of The Expropriation Exception Were Satisfied Were Not "Wholly Insubstantial Or Frivolous"

The court of appeals did not undertake the required analysis. Instead of determining whether H&P-V's allegations actually state a violation of inter-

national law and whether H&P-IDC's allegations actually place its own "rights in property" in issue, the court—applying an "exceptionally low" standard—considered only whether respondents' allegations on those points are "wholly insubstantial or frivolous." Pet. App. 11a (citation omitted); see *id.* at 16a, 20a. The court thus did not correctly resolve those elements of the immunity inquiry.[4]

1. In framing the jurisdictional question as whether respondents' expropriation claims were frivolous, the court of appeals relied only on this Court's decision in *Bell* v. *Hood*, 327 U.S. 678 (1946), which construed the "arising under" requirement in the federal-question jurisdictional statute, now 28 U.S.C. 1331. See Pet. App. 11a (citing *Bell*, 327 U.S. at 682, and *Agudas Chasidei Chabad of U.S.* v. *Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008), which also cites *Bell*). That reliance was misplaced. Cf. *Verlinden*, 461 U.S. at 494-495 (finding that court of appeals erred in importing federal-question-statute precedent into FSIA context); *American Nat'l Red Cross* v. *S.G.*, 505 U.S. 247, 258 (1992) (explaining that Section 1331

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[4] In contrast, other courts of appeals (with the exception of the Ninth Circuit) have understood the inquiry under Section 1605(a)(3) to require a decision about the legal sufficiency of the allegations. See *Mezerhane* v. *República Bolivariana de Venezuela*, 785 F.3d 545, 548-551 (11th Cir. 2015) (holding that the claim did not come within the expropriation exception because the foreign state's alleged actions did not constitute a taking in violation of international law), cert. denied, 136 S. Ct. 800 (2016); *Zappia Middle East Constr. Co.*, 215 F.3d at 251 (same); *de Sanchez*, 770 F.2d at 1394-1398 (same); *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 678-685 (7th Cir. 2012) (same); see also *Siderman de Blake* v. *Republic of Arg.*, 965 F.2d 699, 711 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993).

pleading rule should not have been invoked with respect to "jurisdiction based on a separate and independent jurisdictional grant").

The federal-question statute confers on federal courts jurisdiction over any action that "aris[es] under" the Constitution, treaties, or laws of the United States. 28 U.S.C. 1331; see 28 U.S.C. 41(1) (1940) (version of statute discussed in *Bell*). That statute is not a source of substantive law. See, *e.g.*, *Mims* v. *Arrow Financial Servs., LLC*, 132 S. Ct. 740, 748-749 (2012). Rather, it grants federal courts power to hear "a particular class of cases," *Verlinden*, 461 U.S. at 496—those asserting "a right to recover under the Constitution and laws of the United States," *Bell*, 327 U.S. at 681; see *Merrill Lynch* v. *Manning*, 136 S. Ct. 1562, 1570 (2016).

As *Bell* explains, a claim "arises under" federal law if the claim will be "sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." 327 U.S. at 685; see *Manning*, 136 S. Ct. at 1569-1570. Thus, the federal-question statute has been understood to separate the jurisdictional inquiry from any examination of the legal sufficiency of the plaintiff's claim: a claim may "aris[e] under" federal law even if the court's ultimate construction of federal law will defeat that claim. See *Bell*, 327 U.S. at 685; see also, *e.g.*, *Swafford* v. *Templeton*, 185 U.S. 487, 493-494 (1902). The Court applied that principle in *Bell*, holding that "the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." 327 U.S. at 682. The Court also explained, however, that a suit asserting an "alleged claim under the Constitution or federal stat-

utes" that "is wholly insubstantial and frivolous" may be "dismissed for want of jurisdiction." *Id.* at 682-683; see *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89-90 (1998) (collecting cases).

The D.C. Circuit has understood *Bell* to establish a more general rule, equally applicable to the FSIA as to the federal-question statute, that "[j]urisdiction . . . is not defeated . . . by the possibility that" a complaint "might fail to state a cause of action." Pet. App. 11a (quoting *Bell*, 327 U.S. at 682); see *Chabad*, 528 F.3d at 940. That court has accordingly held that whenever "the plaintiff's claim on the merits directly mirror[s] the jurisdictional standard" set forth in the FSIA, the district court should find the jurisdictional standard satisfied and the foreign state amenable to suit so long as the plaintiff's claim is not frivolous. *Simon* v. *Republic of Hungary*, 812 F.3d 127, 140 (2016). When the "jurisdictional and merits inquiries" are not "fully overlap[ping]," however, the district court is to undertake a more stringent inquiry that asks "whether the plaintiffs' allegations satisfy the jurisdictional standard." *Id.* at 141; see *ibid.* (declining to apply the frivolousness standard to inquiry under the expropriation exception because plaintiffs asserted common-law claims (such as conversion) on the merits and alleged a taking that violated international law only to establish jurisdiction).[5] Although the D.C. Circuit has thus

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[5] The D.C. Circuit assumed that the jurisdictional and merits inquiries "fully overlap" under Section 1605(a)(3) when a plaintiff pleads a cause of action against a foreign state asserting a taking in violation of international law, rather than a garden-variety state-law claim (like conversion, restitution, or breach of contract) in which the property that is the subject of the suit is alleged to have been taken in violation of international law. *Simon*, 812 F.3d

far applied that rule only in cases involving the expropriation exception, it appears that the court may extend its rule to cases involving other exceptions to foreign-state immunity.[6]

The D.C. Circuit's approach is founded on a misunderstanding of the scope of *Bell*. Rather than announcing a general rule that applies to other jurisdictional grants without regard to their text, *Bell* rested on an interpretation of the federal-question statute, see 327 U.S. at 680, 683, which has its own language, "history," and "judicial policy" considerations, *Manning*, 136 S. Ct. at 1570 (citation omitted), and which does not contain any substantive limitations. *Bell*'s frivolousness standard is merely a way of ascertaining whether a claim is so plainly not a true assertion of a right of recovery pursuant to federal law that it cannot be said to fall within the bounds of the broad category marked out by the "arising under" requirement. See 327 U.S. at 682-683; see also *Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

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at 141. But the D.C. Circuit did not address whether there would be a distinct cause of action based directly on an alleged taking in violation of international law, and that issue is not presented here. See Pet. App. 12a (describing respondents' claims as "international expropriation claim[s]" without further discussion); J.A. 103-104; cf. *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004).

[6] See *Owens* v. *Republic of Sudan*, No. 01-2244, 2016 WL 1170919, at *22-*25 (D.D.C. Mar. 23, 2016) (applying rule in *Simon* to case involving 28 U.S.C. 1605A, an immunity exception for claims for personal injury or death "caused by an act of torture, extrajudicial killing, aircraft sabotage, [or] hostage taking"); see also, *e.g.*, 28 U.S.C. 1605(a)(5) (immunity exception for claims for personal injury or death "caused by the tortious act or omission of [a] foreign state").

That standard has no application to the FSIA. Unlike the federal-question statute, the FSIA does not merely address the question of subject-matter jurisdiction over a general category of cases. Instead, it establishes substantive federal immunity standards that both state and federal courts must apply at the outset to determine whether a foreign state is amenable to suit at all. *Verlinden*, 461 U.S. at 493, 497; see pp. 11-18, *supra*; see also *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514-515 & n.11 (2006) (explaining that Congress may condition subject-matter jurisdiction on satisfying a substantive requirement). Thus, "deciding whether statutory subject-matter jurisdiction exists under the [FSIA] entails an application of the substantive terms of the Act to determine whether one of the specified exceptions to immunity applies." *Verlinden*, 461 U.S. at 497-498. And among the expropriation exception's substantive standards is that the claim must put in issue "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). That exception therefore requires a legal inquiry that the federal-question statute eschews: jurisdiction under Section 1605(a)(3) turns on the legal sufficiency of the plaintiff's claim that the alleged taking violated international law.[7]

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[7] This Court recently interpreted a jurisdictional provision worded differently than the federal-question statute to embody the same "jurisdictional test" that has been "formulated for § 1331." *Manning*, 136 S. Ct. at 1570. But the provision involved in that case—conferring jurisdiction over suits "brought to enforce any liability or duty created by" certain securities-law provisions, 15 U.S.C 78aa(a)—is similar to the federal-question statute, and distinct from the FSIA, in asking only about the general nature of a plaintiff's claim (not its substance) and in governing claims as to which there is no presumptive immunity.

The required legal inquiry under the FSIA reflects Congress's judgment about the limited scope of the exceptions to immunity, which in turn stems from important comity and foreign-relations concerns that are unique to suits against foreign states. That judgment and those underlying concerns have no relevance to a jurisdictional determination under the federal-question statute. In establishing a framework that starts with a presumption that a foreign state "shall be immune" from "jurisdiction," 28 U.S.C. 1604, Congress did not intend that a foreign state would be subjected to the burdens of suit based merely on non-frivolous allegations that the FSIA's requirements have been satisfied.

The ill fit between *Bell* and the FSIA is emphasized by the extent to which the D.C. Circuit has departed from the FSIA's text and purposes in creating two different jurisdictional standards—one that applies if the merits of the underlying cause of action "fully overlap" with an element of the jurisdictional inquiry, and another that applies if partial or no overlap exists. *Simon*, 812 F.3d at 141. That elaborate jurisdictional superstructure is nowhere to be found in the relevant provisions of the FSIA, and it is divorced from the statute's underlying goals. Cf. *Chabad*, 528 F.3d at 955-957 & n.3 (Henderson, J., concurring). Congress mandated a careful, substantive inquiry into whether a foreign state is immune from jurisdiction in every case, not just in a limited class of cases.

2. Other rationales that have been advanced by respondents in support of the "exceptionally low" standard applied by the court of appeals, Pet. App. 11a, also fail to justify use of that standard to make jurisdictional determinations under the FSIA.

First, it is not correct to say (*e.g.*, Resp. Supp. Br. 8) that Section 1605(a)(3) merely requires "assert[ion]" of "a certain type of claim"—that is, that a plaintiff must merely assert as a (non-frivolous) legal conclusion that its rights in property have been taken in violation of international law in order to clear the hurdle of Rule 12(b)(1). *Chabad*, 528 F.3d at 941. Section 1605(a)(3) could, of course, have been worded to refer to claims "alleging" or "asserting" a taking of property in violation of international law, see, *e.g.*, 15 U.S.C. 8405, or to claims "arising under" or "brought to enforce" international law, see *Manning*, 136 S. Ct. at 1570-1575.[8] But Congress chose in Section 1605(a)(3) to impose substantive requirements rather than simply to describe the subject matter of the suit. See *Verlinden*, 461 U.S. at 496 (distinguishing FSIA from statutes that "do nothing more than grant jurisdiction over a particular class of cases").

Second, a more searching standard than the D.C. Circuit's is not unworkable merely because a determination of whether Section 1605(a)(3) applies may also involve examination of questions that are pertinent to the merits of the plaintiff's claim. See Resp. Supp. Br. 7-8. Other courts of appeals deciding expropriation-related FSIA cases have applied the correct legal standard without any difficulty. See note 4, *supra*; see also *Arbaugh*, 546 U.S. at 515 n.11 (discussing Congress's "prerogative" to define jurisdiction by imposing substantive requirements that may be "relevant to

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[8] Indeed, Congress did use "arising out of" language in Section 1605 when it so intended. See 28 U.S.C. 1605(a)(5)(B) (stating that the domestic-torts exception does not apply to "any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

the merits of a case"). Outside the FSIA context, concerns that have arisen about a robust jurisdictional inquiry in cases of overlap with the merits are often driven by a prospect that a plaintiff may be deprived of a right to have a jury resolve disputed factual questions. See, *e.g.*, *Arbaugh*, 546 U.S. at 514. But the Rule 12(b)(1) motion in this case makes only a legal challenge to the sufficiency of the jurisdictional allegations, and in any event no plaintiff in an action against a foreign sovereign is ever entitled to a jury trial. See 28 U.S.C. 1330(a) and 1441(d).

It is, in fact, the D.C. Circuit's approach that raises practical difficulties. See generally *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) ("administrative simplicity is a major virtue in a jurisdictional statute"). It would not always be clear whether the jurisdiction and the merits sufficiently "mirror[]" each other to meet the D.C. Circuit's atextual standard. *Simon*, 812 F.3d at 140-141. Application of that standard could result in very similar FSIA cases being decided under different (and sometimes outcome-determinative) jurisdictional analyses, giving rise to confusion among foreign states and other litigants. See *ibid.*; see also *Verlinden*, 461 U.S. at 487-488, 497 (acknowledging need for uniformity under FSIA so that foreign states do not perceive unequal treatment). And the D.C. Circuit's requirement strongly encourages plaintiffs to "recast" their claims to try to achieve the necessary correspondence between the jurisdictional and merits inquiries—the kind of practice on which this Court has frowned as a means of bypassing sovereign-immunity protections. *Nelson*, 507 U.S. at 363; see *ibid.* (refusing to give "jurisdictional significance" to "feint of

language"); see also *OBB Personenverkehr AG* v. *Sachs*, 136 S. Ct. 390, 396 (2015).

Finally, the problems associated with the D.C. Circuit's standard cannot be obviated simply by pointing to the foreign state's ability to file a Rule 12(b)(6) motion to dismiss for failure to state a claim. See Resp. Supp. Br. 6 (citing *Robinson* v. *Government of Malaysia*, 269 F.3d 133, 149 n.1 (2d Cir. 2001) (Sotomayor, J., concurring)). Assuming that the plaintiff's cause of action in a case involving Section 1605(a)(3) can ever overlap completely with the substantive requirements of that exception, see note 5, *supra*, a Rule 12(b)(6) motion would provide a way of testing whether a plaintiff's allegations, taken as true, made out a taking in violation of international law. But if the foreign state made a Rule 12(b)(6) motion and lost, that decision would not be appealable, and the case would proceed to full discovery, dispositive motions, and (perhaps) a bench trial. By contrast, the denial of a Rule 12(b)(1) motion asserting sovereign immunity in an FSIA case may be appealed immediately, thus helping to ensure that a foreign state's immunity is truly an "immunity from suit" and not merely an immunity from liability. *Moran*, 27 F.3d at 172.

3. Application of the D.C. Circuit's "exceptionally low" standard for establishing jurisdiction under Section 1605(a)(3) in a case like this one, Pet. App. 11a, may well do real harm. Recognizing that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *Verlinden*, 461 U.S. at 493, Congress carefully crafted the FSIA's exceptions to immunity to take into account prevailing customary international-law

standards of foreign state immunity, *id.* at 487-488. The D.C. Circuit's use of the frivolousness standard effectively nullifies key elements of the immunity analysis under the expropriation exception, and subjects a foreign state to the power of another sovereign's judicial system and the burdens of litigation, whenever the plaintiff can muster a non-frivolous argument that it has "rights in property" and that international law could be interpreted to prohibit the alleged taking. That permissive approach could result in adverse foreign-relations consequences and reciprocal adverse treatment of the United States in foreign courts. See pp. 20-22, *supra*.

C. The Judgment Should Be Vacated And The Case Remanded For Further Consideration Under The Correct Legal Standard

Because the court of appeals applied an insufficiently rigorous standard, it failed to determine whether respondents' allegations satisfied Section 1605(a)(3)'s requirements.

With respect to whether respondent H&P-V's expropriation claim satisfied Section 1605(a)(3)'s requirement that a "tak[ing] in violation of international law" be "in issue," 28 U.S.C. 1605(a)(3), the court of appeals held only that H&P-V's argument was "non-frivolous," Pet. App. 17a (citation omitted). The court acknowledged that international law does not generally speak to a sovereign's actions with respect to the property of its own nationals, but believed that a colorable argument could be mustered that a corporate plaintiff's own nationality may be disregarded "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders." *Id.* at 14a (citation omitted). That ruling set the bar for

making the jurisdictional determination too low. The court should, instead, have answered the legal question before it and definitively ruled on whether a "generally accepted norm" of international expropriation law prohibits the taking of a domestic corporation's property to discriminate against foreign shareholders. *de Sanchez*, 770 F.2d at 1396.

The court of appeals made the same error with respect to whether respondent H&P-IDC adequately alleged that its own "rights in property" were "in issue." 28 U.S.C. 1605(a)(3); see Pet. App. 22a. The court recognized that "[a] corporation and its shareholders are distinct entities" and that a shareholder generally does not have an ownership interest in the corporation's property. *Dole Food*, 538 U.S. at 474-475. But the court nonetheless held that H&P-IDC might have "rights in" respondent H&P-V's property for purposes of Section 1605(a)(3), without examining the source or scope of those potential rights. Pet. App. 19a-22a. The court should, instead, have determined whether respondents' allegations were legally sufficient to place H&P-IDC's "rights in property" in issue. The court should have first examined whether the law of the state of H&P-V's incorporation—Venezuela—gave H&P-IDC, as H&P-V's shareholder, any direct rights. See *Case Concerning the Barcelona Traction, Light & Power Co.* (*Belgium* v. *Spain*), 1970 I.C.J. 3, ¶ 47 (Feb. 5). The court then should have considered whether any such rights constitute "rights in property" for purposes of Section 1605(a)(3). See *Permanent Mission*, 551 U.S. at 198-199. Finally, had it identified any relevant "rights in property," the court should have determined whether the complaint sufficiently alleges that "rights in property [were]

taken in violation of international law." 28 U.S.C. 1605(a)(3).

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for consideration under the proper standard.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1330 provides:

Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

2. 28 U.S.C. 1331 provides:

Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 28 U.S.C. 1602 provides:

Findings and declaration of purpose

The Congress finds that the determination by United States courts of the claims of foreign states to immunity

from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

4. 28 U.S.C. 1603 provides:

Definitions.

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of

this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

5. 28 U.S.C. 1604 provides:

Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

6. 28 U.S.C. 1605 provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in im-

movable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the

United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110-181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for subsection 1605A, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery

on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The Court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

7. 28 U.S.C. 1605A provides:

Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign

state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this sec-

tion) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the

effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

8. 28 U.S.C. 1606 provides:

Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the

action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

9. 28 U.S.C. 1607 provides:

Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

10. 28 U.S.C. 1608 provides:

Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the

clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

11. 28 U.S.C. 1609 provides:

Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

12. 28 U.S.C. 1610 provides:

Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in viola-

tion of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of

execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), (5), or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or

prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701-1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state un-

der the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

13. 28 U.S.C. 1611 provides:

Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the

bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.